## A MATTER IN ARBITRATION



| | | |
|---|---|---|
| In a Matter Between: | Grievance: | Termination |
| PACIFIC GAS AND ELECTRIC COMPANY | | |
| (Employer) | Hearing: | April 19, 1997 |
| and | Award: | May 15, 1997 |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 (Union) | McKay Case No. 97-106 | |

## DECISION AND AWARD

**GERALD R. McKAY, ARBITRATOR**
**ROGER STALCUP, UNION BOARD MEMBER**
**KATHY MAAS, UNION BOARD MEMBER**
**MARGARET SHORT, COMPANY BOARD MEMBER**
**KATHY PRICE, COMPANY BOARD MEMBER**

Appearances By:

Employer:

**Stacy A. Campos, Esq.**
Pacific Gas and Electric Company
Law Department
P.O. Box 7442
77 Beale Street
San Francisco, California 94120-7442

Union:

**Tom Dalzell, Esq.**
Staff Attorney
International Brotherhood of Electrical Workers, Local 1245
P.O. Box 4790
3063 Citrus Circle
Walnut Creek, California 94596

## A MATTER IN ARBITRATION

| | | |
|---|---|---|
| In a Matter Between: | Grievance: | Termination |
| PACIFIC GAS AND ELECTRIC COMPANY | | |
| (Employer) | Hearing: | April 19, 1997 |
| and | Award: | May 15, 1997 |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 (Union) | McKay Case No. 97-106 | |

## STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties selected this arbitrator in accordance with the terms of the Contract to hear and resolve the matter. A hearing was held on April 19, 1997. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or about May 7, 1997. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

1 Joint Exhibit #1

## ISSUE

Was the grievant terminated for just cause? If not, what shall be the remedy[2]

## RELEVANT CONTRACT LANGUAGE

### TITLE 102. GRIEVANCE PROCEDURE

### 102.1 STATEMENT OF INTENT - NOTICE

The provisions of this Title have been amended and supplemented from time to time. Company and Union have now revised and consolidated this Title in its entirety to provide a concise procedure for the resolution of disputes.

It is the intent of both Company and Union that the processing of disputes through the grievance procedure will give meaning and content to the Collective Bargaining Agreement.

The parties are in agreement with the policy expressed in the body of our nation's labor laws that the mutual resolution of disputes through a collectively bargained grievance procedure is the hallmark of competent industrial self-government. Therefore, apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure.

Union agrees to provide grievant(s) with a copy of any settlement reached at the grievant's last known address. Such copy shall be sent by certified, U.S. mail, or handed to the grievant, within 30 calendar days of the signing of the settlement.

### 102.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

(a) Interpretation or application of any of the terms of this Agreement, including exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.

(b) Discharge, demotion, suspension or discipline of an individual employee.

(c) Disputes as to whether a matter is proper subject for the grievance procedure.

---

2 Joint Exhibit #2

## BACKGROUND

The grievant worked for the Employer beginning March 9, 1972 until February 7, 1996 when he was terminated for his alleged involvement in a scheme to steal copper wiring from a customer. At the time of his termination, the grievant was classified as an electric crew foreman. However, on the day the incident occurred, the grievant was working on a crew headed by C as a lineman. The crew, which included the grievant, was assigned to replace several poles near a Los Altos School District facility located on Covington Road in Los Altos. The work was scheduled as overtime on Saturday and Sunday, November 18 and 19. The crew began working at approximately 6:07 in the morning on Saturday. The grievant remained with the crew until approximately 5:00 p.m. on Saturday but did not return on Sunday to complete the work. During the course of replacing the poles, Mr. C , the foreman on the crew and several other employees pulled the copper wire service which went to the School District facility and replaced it with aluminum wire. The copper wire belonged to the School District, and Mr. C had not obtained permission either to pull the service or to keep e copper wire after it had been pulled. Mr. C and other employees used Company vehicles to help load the wire and sold the copper wire during working hours to a vendor, receiving several thousand dollars for the wire.

Mr. C and several other employees were terminated, in part, for stealing the copper wire and selling it on Company time. While the grievant was not directly involved in the activity of pulling the wire or selling it, he did receive some money from Mr. C either as a share of the proceeds or for the purpose of keeping quiet about what Mr. C had done. The money which he was given, the grievant stated, was returned to Mr. C . Nevertheless, the Employer determined that the grievant was also guilty of the same misconduct which caused the termination

of Mr. C and terminated the grievant. It is the position of the Union that the grievant was entirely innocent of any wrongdoing; but even if he was guilty of some wrongdoing, his culpability does not warrant a termination.

There is no evidence in the record that the grievant participated or had any pre-knowledge of the decision to pull the copper wire from the School District property. The grievant acknowledged in a factfinding statement he gave that he wondered why Mr. C was pulling out the service, but he chose not to raise it either with Mr. C or with anyone else. The grievant left the project Saturday afternoon at approximately 5 p.m. and did not return. The grievant was not involved in putting the copper wire onto one of the Company trucks for transport or in the sale of the copper wire to the outside vendor. However, on approximately Tuesday, November 21, the grievant acknowledged that he received $200 from Mr. C , either on the basis that it was his share of the sale of copper wire or because Mr. C wished the grievant to keep his mouth shut about what he observed with respect to pulling the copper wire. The grievant's story concerning the statements made to him by Mr. C at the time the money was delivered have not been consistent. The following day after rumors began to circulate that the activity of the crew and pulling the copper wire and selling it might be known by management, the grievant gave the money back to Mr. C telling him that he did not want any part of that problem. In a statement Mr. C gave to the factfinders, Mr. C denied that the grievant gave him the money back.[3]

---

3 Mr. C had been terminated by the Employer but was still residing in the Bay Area and was physically within the jurisdiction of the arbitrator to subpoena him as a witness.

On the Monday following the weekend when the service was pulled, a number of employees, including Mr. C and a Mc participated in renting a vehicle and using a Company truck to load the copper wire which had been taken from the school property onto the rented truck. Mr. Mc 's involvement was in participating in the rental of the private vehicle and the transfer of the copper wire onto the truck by using a Company vehicle. Mr. Mc was not given any money for his involvement in the sale of the copper wire by Mr. C In the investigation, Mr. Mc acknowledged that it did not appear to him that Mr. C and the other employees were involved in conducting Company business, but Mr. Mc chose not to question their actions or report their actions to anybody in management.

One of the employees involved in the pulling, transportation and sale of the copper wire was Cl . Mr. Cl worked with Mr. C in pulling the copper service. After it was pulled and loaded onto a Company vehicle, Mr. Cl drove the wire to the home of P , another employee on the job who on that day was working with the grievant replacing poles. On Monday, Mr. Cl rented a truck. Mr. Cl returned to Mr. P 's house with the rented truck and participated in loading the copper wire onto the rental truck. After the truck was loaded, he went with Mr. C and another employee to 2 different scrap dealers in an effort to sell the copper wiring. After doing all of this, Mr. Cl had a pang of conscience which caused him to call his supervisor and confess his participation in the misadventure. For his participation in the copper caper, Mr. Cl received $500.

Of the employees involved in the copper pulling, C was terminated; Cl was terminated; Ca was terminated; P was terminated; the grievant was terminated; Mc was given a decision-making leave, and L was

given a decision-making leave. Later in the grievance process, the parties negotiated a resolution to all of the cases with the exception of the grievant's. Four of the employees remained terminated; Mr. Mc and Mr. Cl had their decision-making leave reduced to written reminders. The Union and the Company were not able to agree, however, on the disposition of the grievant's case, and he remained terminated.

## POSITION OF THE PARTIES

### EMPLOYER

The Employer argued that it had just cause to terminate the grievant. Citing the seven steps of just cause authored by arbitrator Daugherty, the Employer applied each of the steps to the facts in the present case in reaching its conclusion that it had just cause. First, the grievant was warned of the consequences of his misconduct. Secondly, the Employer's policies regarding the theft of customer property are reasonably related to the efficient operation of its business. Third, the Employer's investigation of the theft of the customer's wire was fair and objective. Fourth, the Employer had substantial evidence the grievant accepted money from the sale of the stolen copper wire. Fifth, the Employer did not discriminate in terminating the grievant's employment for accepting proceeds from the sale of the customer's copper wire. Sixth, the termination of the grievant's employment was appropriate given the seriousness of his misconduct. Finally, in light of all of the circumstances, including the grievant's lack of credibility, the grievance must be denied.

The Employer focused on the issue of substantial evidence, noting that during the corporate security interview, the grievant admitted that he accepted $150 from Mr. C during the week following the completion of the pole replacement project. He also admitted that when Mr. C handed him the money, he was told that it represented his share of the proceeds of the sale of the copper wire. The grievant also admitted by working on the crew he felt uneasy about the crew's pulling the wire. All of these facts demonstrate the grievant knowingly accepted proceeds from the sale of stolen wire. The Union's contention the grievant should not be disciplined because he believed the crew had the customer's permission to sell the wire is not supported by the evidence. The grievant acknowledged at the arbitration hearing that he never heard Mr. C tell anyone that the crew had permission to keep the copper wire. One of the conflicting facts in the investigation was whether or not the grievant kept the money which does not mitigate the seriousness of the grievant's misconduct. Whether or not the grievant returned the money, he still participated in the theft by initially accepting the $150 that Mr. C handed to him. He accepted the cash without any question. The grievant returned the money not based on regret or altruistic feelings but because he heard that Mr. C was about to get into trouble. For all these reasons, the termination should be sustained and the grievance denied.

## UNION

The Union argued the grievant's conduct must be judged in the context of the Employer's policy with respect to scrap materials. There is no dispute that the grievant, himself, was not directly involved in the salvaging of the customer-owned copper wire. He was not even tangentially involved in the crew's effort to sell the copper wire as scrap on Monday morning. In light of the grievant's involvement, the Employer focuses on the fact the grievant accepted money

from Mr. C on Tuesday. Based on the grievant's involvement, the Union asserted, the Company must answer three questions in the affirmative if it wishes to sustain its discharge. First, did the grievant know that Mr. C did not have the permission of the Los Altos School District to salvage the customer-owned copper? Second, did the grievant know the material had been salvaged on Company time? And, three, did the grievant know that the material had been salvaged with Company equipment? If these questions cannot be answered affirmatively, then the grievant did nothing improper by accepting money from Mr. C .

First, the Employer did not prove that the grievant was unaware that Mr. C had not received permission from the Los Altos School District to salvage the customer-owned copper. The Employer had no non-hearsay testimony with respect to C 's permission or lack thereof. The testimony in the record is that other crew members had been told by C that he had permission to take the copper. The grievant was not involved in any way on the Monday effort to scrap the copper. Mc , who used Company time to transport the copper on Monday and falsified his timecard to hide the fact, was only given a decision-making leave for his misconduct which was later reduced to a written reminder. The Employer's argument that the grievant should be held to a higher standard since he was an electric crew foreman has no merit since he was not in charge of the crew on Saturday.

The Employer's argument that the grievant should be disciplined for failing to report the wrongdoing fails for several reasons. First, the Employer cannot point to a single instance where it has invoked its standard practice of discipline against an employee solely for failing to report suspected wrongdoing. Secondly, the Employer must concede that Mr. Mc knew what Mr. C was doing on Monday and yet chose not to report C which did not lead to

Mc 's termination. The Union noted that it supported the termination of the four crew members who actually participated in the copper cable caper. The Employer cannot sustain the burden of establishing that the grievant's acceptance of money from Mr. C was done with knowledge that the Employer's pro-scraping policy had been violated. Employees who were involved to a far greater degree than the grievant, Mc and L , were not even terminated. For all these reasons, the Union asked that the grievant be reinstated with full back pay and benefits.

## DISCUSSION

The present set of facts are ones which place the Employer in an extremely difficult, if not impossible, situation. The primary evidence the Employer needed to establish knowing culpability on the part of the grievant rested with the four employees whom the Employer chose to terminate. Mr. C , for example, was a critical witness concerning the grievant's knowledge and intent in accepting money on Tuesday. The Employer wishes the arbitrator to conclude that the grievant accepted money from C which he realized came from the sale of stolen copper wire. The grievant acknowledges accepting money but believes he accepted money for not reporting what he suspected might be wrongdoing on the part of Mr. C . Furthermore, the grievant claimed that he returned the money to Mr. C when he decided it would be in his best interest not to keep his mouth shut any further. While the grievant's acceptance of money to keep his mouth shut is wrong, it is not the basis for the Employer's termination which charged the grievant with involvement in the theft of the School District's wire.

Having chosen to terminate the four employees, the Employer put itself in a position where obtaining the testimony of these four employees to assist in its case against the grievant became

extremely problematic. The Union agreed with the Employer that the four employees who were terminated were appropriately terminated under the concept of just cause. With both the Union and the Company agreeing that the four employees who were terminated engaged in wrongdoing, it is highly optimistic to anticipate that any of the four employees would have cooperated either with the Union or with the Employer concerning the disposition of the case involving the grievant. Even if the arbitrator had been requested to subpoena the employees who were terminated and even if those employees had complied with the subpoena and appeared at the hearing, it is unlikely they would have provided helpful and straight-forward testimony in the manner which the Employer would have needed to sustain its case against the grievant. It is one of those situations where in catching the big fish, the little fish get away.

The arbitrator is not concluding that the Employer is wrong in its assertion that the grievant knew what was going on and chose to acquiesce in the wrongdoing by not reporting it and by accepting money for keeping quiet. What the arbitrator is concluding is that the Employer failed to present non-hearsay testimony to establish those facts. The written report of the factfinders is not competent evidence on disputed facts, such as the arbitrator presently has before him. The Union refused to concede that the factfinding reports could be used as a substitute for direct testimony. Unless the parties have a mutually agreed-upon record which the arbitrator can treat as if it were testimony given at the arbitration, it is incumbent upon the party with the burden of proof to call the necessary witnesses or produce the necessary evidence to sustain its burden. The Employer did not do that in the present case, not through any fault of the Employer but because of the circumstances surrounding the present dispute.

It seems unlikely to the arbitrator that an employee with the experience the grievant has had with this Employer, particularly in his capacity as a foreman, would not have suspected some unusual activity was occurring when the copper wire was pulled by Mr. C. . Everyone appears to agree that pulling copper wire under those circumstances was unusual and probably was not necessary. As a minimum, one would ask why is it necessary to pull copper wire when the service appears to be in working order. The grievant, of course, chose not to ask any questions which suggests to the arbitrator that he probably did not want to know the answers. Furthermore, by the grievant's own testimony, he was initially willing to accept money to keep his mouth shut again suggesting that if he opened his mouth, he might raise suspicions concerning the propriety of Mr. Cassity's activity in pulling the copper wire. The Employer charged the grievant with complicity in the conspiracy to steal the copper wire and sell it for scrap. The Employer has failed to establish by competent evidence the grievant was part of this conspiracy. What the record does show is that the grievant was probably aware of the conspiracy but chose to keep his mouth shut.

For his efforts at keeping his mouth shut, he did receive some money. This money, in some respects, is no different than the money that Mr. Mc . received in the form of wages and overtime on Monday when he participated in the transportation of the stolen property. Mr. Mc , likewise, probably realized that what he was doing was not appropriate. He probably realized that he should not be accepting Company wages for activity which clearly had nothing to do with the Employer or its business. Once again, he accepted those wages in part for keeping his mouth shut. It is difficult to know whether the grievant or Mr. Mc is more culpable. Certainly, both of them carry some level of blame. In the arbitrator's opinion, the grievant was probably more culpable since he generally carried more responsibility with the Company, serving as foreman and, therefore, was probably more intimately aware of the Employer's policies and prohibitions.

The only competent evidence in the record establishes that the grievant did not keep the money which Mr. C gave to him. Instead, the grievant returned the money when it became apparent that Mr. C 's wrongdoing was about to be uncovered by the Employer. Since the grievant received the money for keeping his mouth shut and since it was apparent that he could probably not keep his mouth shut any longer, he returned the money. Whether he kept the money or returned the money under the circumstances is really irrelevant. The grievant's wrongdoing was failing to report activity which he knew or probably knew was wrong. The Union asserted that the Employer has never disciplined any employee solely on the basis that the employee failed to report the wrongdoing of his fellow employees. There is no evidence in the record to contradict the Union's assertion. Nevertheless, that does not establish, in the arbitrator's mind, the Employer has condoned failing to report wrongdoing if an employee is aware of it. It is the arbitrator's opinion that an employee has a duty of loyalty to his or her employer to protect the interests of the employer. Certainly, if employees are aware that other employees are stealing money from the employer or engaging in activity that can hurt the financial interests of the employer, those employees who are aware of it in some respects are cutting off their nose to spite their face by not reporting it. If the employer does worse financially as a result of the wrongdoing of employees, all of the wages and benefits of employees working for that employer are going to be adversely affected. The failure, in this respect, to report wrongdoing hurts the individual who fails to report it while allowing the wrongdoers to profit at the expense of all the other employees.

In light of the record which is before the arbitrator, he is compelled to conclude the Employer did not have just cause to terminate the grievant for the reasons set forth by the Employer. Unfortunately, the Employer was not able to present competent, non-hearsay testimony to establish the necessary evidence to prove its case. As the arbitrator noted, this was not the fault of the Employer but was the fault of the circumstances surrounding the events in this case. The

record does establish to the arbitrator's satisfaction that the grievant probably was aware that wrongdoing was occurring and chose deliberately and knowingly not to report the wrongdoing to the appropriate authorities. He received compensation for his cooperation in not reporting the wrongdoing and may have kept that compensation or may have returned it. Because of the grievant's duty of loyalty to the Company and because the wrongdoing was extremely serious, the discipline of a decision-making leave in the Employer's scheme of disciplinary actions would, in the arbitrator's opinion, have been appropriate. In this respect, the arbitrator is going to conclude that the Employer did not have just cause to terminate the grievant but did have cause to impose a decision-making leave on the grievant. The Employer is directed to reinstate the grievant with back pay and benefits, less any outside earnings; and the grievant's record is to reflect that he is the recipient of a decision-making leave for failing to properly report wrongdoing of which he was fully aware.

## AWARD

The Employer did not have just cause to terminate the grievant. The grievant is directed to be reinstated in accordance with the discussion above with a decision-making leave placed into his record.

It is so ordered.

May 15, 1997

**Gerald R. McKay, Arbitrator**

**Roger Stalcup, Union Board Member**

**Kathy Maas, Union Board Member**

**Margaret Short, Company Board Member**

**Kathy Price, Company Board Member**